No. 87-1674

Supreme Court, U.S.
FILED
MAY 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

ERNESTO J. BENEVENTO, ERNEST A. BENEVENTO, AND CARMINE LOIACONO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether evidence seized in violation of 31 U.S.C. (Supp. III) 5317(b) must be excluded at trial.

2. Whether the trial court correctly found that the warrants to search the Beneventos' homes were valid under *Franks* v. *Delaware,* 438 U.S. 154 (1978).

3. Whether the district court erred in declining to hold a hearing to determine whether the warrants were valid under *Franks* v. *Delaware.*

4. Whether a conspiracy charge may constitute a predicate act for a substantive RICO violation under 18 U.S.C. 1962(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a-47a) is reported at 836 F.2d 60. The opinion of the district court (Pet. App. 1a-19a) is reported at 649 F. Supp. 1379.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 1987. A petition for rehearing was denied on February 8, 1988. The petition for a writ of certiorari was filed on April 8, 1988. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, all three petitioners were convicted of conspiring to manufacture and dis-

tribute heroin (Count 1), in violation of 21 U.S.C. 846; participating in a racketeering enterprise through a pattern of racketeering activity (Count 4), in violation of 18 U.S.C. 1962(c); and conspiring to conduct and participate in the affairs of the racketeering enterprise (Count 5), in violation of 18 U.S.C. 1962(d). In addition, petitioners Ernesto J. Benevento and Ernest A. Benevento were convicted of interstate travel in aid of racketeering (Count 2), in violation of 18 U.S.C. 1952; and conducting a continuing criminal enterprise (Count 6), in violation of 21 U.S.C. 848. Ernesto J. Benevento was also convicted on a second count of interstate travel in aid of racketeering (Count 3), in violation of 18 U.S.C. 1952. Ernesto J. Benevento was sentenced to concurrent terms of 25 years' imprisonment on Counts 1 and 6; 20 years' imprisonment on Counts 4 and 5; and five years' imprisonment on Counts 2 and 3. The district court also imposed a total of $500,000 in fines on Counts 1 and 2. Ernest A. Benevento was sentenced to concurrent terms of 18 years' imprisonment on Counts 1, 4, 5, and 6; and five years' imprisonment on Count 2. In addition, the district court imposed a total of $250,000 in fines on Counts 1 and 4. Carmine Loiacono was sentenced to concurrent terms of 15 years' imprisonment on Counts 1, 4, and 5, and he was fined $100,000 on Count 1. The court of appeals affirmed (Pet. App. 20a-47a).

1. The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals. It showed that petitioners and co-defendant Earl Keller, together with their associates in the United States, Mexico, and Europe, formed a company known as the J.E.M. Corporation for the purpose of manufacturing and distributing heroin in the United States. During the first phase of their operations, petitioners Ernesto J. Benevento and Loiacono purchased 300 kilograms of morphine overseas and imported it into West Palm Beach,

Florida. Petitioners then transported the morphine to a house in Chandler, Arizona, owned by Ernesto's uncle, petitioner Ernest A. Benevento. There, the morphine was converted into heroin and later distributed. From July 1984 to March 1985, J.E.M. Corporation sold approximately 146 kilograms of heroin for a gross profit of about $23 million. Pet. App. 23a-25a.

Following its initial venture, J.E.M. Corporation began a second, similar venture known as "Project 2." To facilitate the overseas aspects of that transaction, J.E.M. arranged to smuggle currency out of the country by using one of the company's associates, Fatima dos Santos Nobre, as a courier. By that time, however, the Drug Enforcement Administration (DEA) had become aware of J.E.M.'s operations and had begun to maintain surveillance of Nobre during her trips out of the country. Pet. App. 25a.

In March 1985, after Nobre had checked in at Miami International Airport, DEA agents seized her luggage and searched it. Inside, the agents found $400,000 in currency for which Nobre had not filed a currency declaration. The agents seized the currency, but to avoid arousing Nobre's suspicions, they marked the luggage to create the appearance that someone had tampered with it. The agents then permitted the luggage to be transported to Switzerland. Pet. App. 25a-26a.

In May 1985, Nobre returned to the United States and met with Ernesto J. Benevento at a hotel in New York City. Benevento gave Nobre several hundred thousand dollars in currency and, under DEA surveillance, drove her to John F. Kennedy International Airport in New York. After Nobre checked her baggage on a SwissAir flight to Switzerland, DEA agents opened the baggage and photographed the contents. The agents, however, did not seize the money at that time. Pet. App. 26a.

On June 3, 1985, J.E.M. attempted to make a third transfer of currency overseas. The Beneventos arrived at Kennedy Airport and checked their luggage on a SwissAir flight to Geneva, Switzerland. A SwissAir employee, however, recognized Ernesto J. Benevento as the man who had accompanied Nobre during her trip the month before. SwissAir officials alerted a Customs agent, who seized the luggage and searched it. Inside, the agent found $956,000 in cash. When the Beneventos boarded the flight without filing an outbound currency declaration, they were arrested. Pet. App. 26a-27a, 32a-33a.

Following their arrest, the Beneventos remained free on bail. On June 4, 1986, a magistrate in the Southern District of Florida issued warrants to search the Beneventos' residences. In support of the search warrants, the government submitted affidavits that detailed petitioners' narcotics transactions and explained that records pertaining to those transactions would probably be found in the Beneventos' residences. Agents thereafter executed the searches and seized computer software that revealed evidence of petitioners' narcotics activities. Pet. App. 7a-8a, 27a, 38a; Pet. 11.

2. Prior to trial, the Beneventos moved to suppress the $956,000 in cash seized from their luggage at Kennedy Airport, as well as the evidence seized from their residences. The district court denied both motions (Pet. App. 3a-10a). The district court first held that the search of petitioners' luggage fell within the "border search exception" to the Fourth Amendment and was therefore constitutional (*id.* at 3a). It also rejected (*id.* at 3a-6a) the contention that the evidence should be excluded under 31 U.S.C. (Supp. III) 5317(b), finding "no evidence in either the language or the legislative history of § 5317(b) to suggest that Congress, in enacting that provision in 1984, intended that an exclu-

sionary remedy be applied to illegally seized evidence" (Pet. App. 5a (footnote omitted)). Next, the district court rejected (*id.* at 6a-10a) petitioners' contention that the affidavits submitted in support of the warrants to search the Beneventos' residences contained false statements, in violation of *Franks* v. *Delaware,* 438 U.S. 154 (1978). Petitioners had argued that the affidavits misleadingly failed to disclose the fact that the government had uncovered no additional criminal activities by the Beneventos between June 3, 1985 (the date of their arrest), and May 28, 1986 (the date of the search warrants). The court held that "[t]he absence of a statement that there was no evidence of continuing criminal activity has no bearing on whether evidence of past crimes might still exist" (Pet. App. 9a).

3. The court of appeals affirmed in part, reversed in part, and vacated in part (Pet. App. 20a-47a).[1] The court first upheld (*id.* at 32a-38a) the district court's decision denying the Beneventos' motion to suppress the currency seized from their luggage. The court agreed (*id.* at 34a-37a) that under 31 U.S.C. (Supp. III) 5317(b) the luggage search was not supported by a "reasonable suspicion." It concluded (Pet. App. 37a-38a), however, that evidence seized in violation of Section 5317(b) need not be suppressed. The court of appeals explained (Pet. App. 37a) that "there is nothing in the legislative history of

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[1] The court of appeals held that petitioner Ernest A. Benevento could not be held liable under an aiding and abetting theory for conducting a continuing criminal enterprise, and it therefore reversed his conviction on Count 6 (Pet. App. 40a-42a). In addition, because the narcotics conspiracy charged in Count 1 was a lesser included offense of the continuing criminal enterprise charged in Count 6, the court of appeals vacated petitioner Ernest A. Benevento's concurrent sentence on Count 1 and remanded for resentencing (*id.* at 46a-47a).

Section 5317(b) indicating that Congress intended an exclusionary remedy for violations of the statute." The court noted that where Congress has intended to have evidence suppressed because of a statutory violation, it has expressly provided for suppression as a remedy (*ibid.*). The court also noted (*ibid.* (citation omitted)) that implying an exclusionary remedy for violations of Section 5317(b) would " 'weaken the manifest purpose of the statute' " which was "to bestow greater powers on federal agents to prevent drug traffickers from engaging in currency smuggling."

The court of appeals next upheld (Pet. App. 38a-40a) the district court's order denying the Beneventos' motion to suppress the evidence seized from their homes. The court rejected the claim that it was a material falsehood to omit from the affidavits the fact that the agents had found no evidence of criminal activity between the date of petitioners' arrest in June 1985 and the date of the warrants. The court explained (*id.* at 39a) that "this claimed 'omission' was in fact not an omission at all" because the affidavits had clearly stated that the petitioners' criminal activity occurred prior to June 3, 1985, and did not claim that there had been any criminal activity at petitioners' residences since that date. The court of appeals also upheld the district court's finding that the affidavits established probable cause to conduct the searches (*id.* at 39a-40a).[2]

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[2] In particular, the court of appeals found (Pet. App. 39a) that "[t]he affidavits filed by the government in support of its search warrant applications contained extensive testimony regarding the Beneventos' involvement in an international narcotics conspiracy and contained specific statements from the government's confidential informants that provided key details of various aspects of the narcotics conspiracy." The court also found (*id.* at 39a-40a) a sufficient basis to believe that evidence of the narcotics conspiracy would be found in the Beneventos' homes.

Finally, the court of appeals rejected (Pet. App. 42a-44a) petitioner Loiacono's contention that a conspiracy charge cannot serve as a predicate act for a substantive RICO conviction. Following circuit precedent, the court upheld Loiacono's RICO conviction because "[c]onspiracies to violate the narcotics laws, if proven, are properly chargeable as predicate acts" (*id.* at 43a).

ARGUMENT

1. Petitioners Ernesto J. Benevento and Ernest A. Benevento first contend (Pet. 12-13) that the court of appeals' refusal to imply an exclusionary rule under 31 U.S.C. (Supp. III) 5317(b) conflicts with the Eleventh Circuit's decision in *United States* v. *Chemaly*, 741 F.2d 1346 (1984), reinstated, 764 F.2d 747 (1985) (en banc). There is, however, no clear conflict between the cases. Moreover, a recent amendment to Section 5317(b) deprives the statutory issue of any continuing importance. And in any event, the admission of the evidence seized from the Beneventos' luggage was entirely harmless. Further review is therefore unwarranted.

a. At the time of the search of the Beneventos' luggage, Section 5317(b) provided that a Customs officer may conduct a search for currency only where there is "reasonable cause" to believe that evidence of a currency violation will be found.[3] The issue in the *Chemaly* case was whether

[3] As the court of appeals noted (Pet. App. 35a n.1), Section 5317(b) has since been amended effective October 27, 1986, by the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, § 1355, 100 Stat. 3207-22. As amended, Section 5317(b) now provides:

> Searches at border.—For purposes of ensuring compliance with the requirements of section 5316, a customs officer may stop and search, at the border and without a search warrant, any vehicle, vessel, aircraft, or other conveyance, any envelope or other container, and any person entering or departing from the United States.

Customs agents violated 31 U.S.C. (1976 ed.) 1105—the predecessor to Section 5317(b)—when they failed to obtain a warrant prior to conducting a currency search of a person departing the United States.[4] The court of appeals concluded that evidence seized without a warrant under Section 1105 must be suppressed (741 F.2d at 1349-1354). The search of the Beneventos' luggage, however, was governed by 31 U.S.C. (Supp. III) 5317(b), not Section 1105. As the district court noted (Pet. App. 6a), Section 5317(b) was enacted in 1984 with "the express purpose of * * * reduc[ing] the barriers to conducting currency searches." The 1984 provision abandoned the warrant requirement of Section 1105 entirely, and in place of the probable cause standard in Section 1105 the new provision required that currency searches at the border be based on no more than "reasonable cause to believe there is a monetary instrument being transported [illegally]." As

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[4] Prior to its replacement in 1984 by Section 5317(b), Section 1105 provided:

> (a) If the Secretary has reason to believe that monetary instruments are in the process of transportation and with respect to which a report required under Section 1101 of his [*sic*] title has not been filed or contains material omissions or misstatements, he may apply to any court of competent jurisdiction for a search warrant. Upon a showing of probable cause, the court may issue a warrant authorizing the search of any or all of the following:
>
> (1) One or more designated persons.
>
> (2) One or more designated or described places or premises.
>
> (3) One or more designated or described letters, parcels, packages, or other physical objects.
>
> (4) One or more designated or described vehicles.
>
> Any application for a search warrant pursuant to this section shall be accompanied by allegations of fact supporting the application.
>
> (b) This section is not in derogation of the authority of the Secretary under any other law.

both the district court (Pet. App. 5a) and the court of appeals (*id.* at 37a) found, there is nothing in either the language or legislative history of the 1984 amendment to suggest that Congress intended that evidence seized in violation of Section 5317(b) be subject to an exclusionary rule.

b. In any event, the question whether an exclusionary rule applies to evidence seized in violation of Section 5317(b) is no longer of any continuing importance. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, Tit. I, § 1355, 100 Stat. 3207-22, has amended Section 5317(b) to authorize Customs agents to conduct currency searches at the border without a warrant and without reasonable cause. Because the new law deprives the statutory issue presented in the petition of any continuing significance, petitioners' claim does not warrant further review.

c. Finally, even if suppression were the appropriate remedy for violations of former Section 5317(b), the admission of the evidence seized from the Beneventos' luggage was plainly harmless. As the court of appeals observed (Pet. App. 28a), the evidence at trial "overwhelmingly established [petitioners'] guilt of the crimes charged in the indictment." For example, "[t]he computer records obtained from Ernest A. Benevento's home substantially corroborated the government's witnesses' testimony and set out in detail the intricacies of J.E.M.'s international drug operations" (*ibid.*). The admission of the currency seized from the Beneventos' luggage therefore did not substantially affect the jury's verdict. *United States* v. *Lane*, 474 U.S. 438, 449-450 (1986); *Kotteakos* v. *United States*, 328 U.S. 750, 763-765 (1946).

2. Petitioners Ernesto J. Benevento and Ernest A. Benevento next contend (Pet. 14-20) that the warrants to search their homes were invalid under *Franks* v. *Delaware*,

438 U.S. 154 (1978). They assert that the affidavits in support of the warrants were based upon "half-truths" (Pet. 19), in that they failed to advise the magistrate that wiretaps installed on the Beneventos' home computer lines had failed to turn up any incriminating evidence since the date of their arrest. But as the district court (Pet. App. 9a-10a), affirmed by the court of appeals (*id.* at 39a), explained, petitioners' contention misconceives the allegations of the affidavits. The affidavits established probable cause to believe that evidence of petitioners' prior narcotics transactions would still be present in their residences. "[T]he absence of any statement that wiretaps on the Benevento's computer pulse lines failed to pick up incriminating evidence after June 3, 1985 cannot be considered a material omission." *Id.* at 9a.

3. Petitioners Ernesto J. Benevento and Ernest A. Benevento also contend (Pet. 21) that they were entitled to an evidentiary hearing under *Franks* v. *Delaware, supra,* to examine the magistrate about the circumstances under which certain handwritten interlineations were made on one of the affidavits for the search warrants. Petitioners contend that the magistrate's testimony would bear on the issue of the agents' "good faith" (Pet. 21). As the courts below concluded, however, the affidavits established probable cause for the searches; thus, the question whether the agents relied on the warrants in good faith was simply not presented, and the district court was not required to permit petitioners to call as a witness the magistrate who issued the warrants.

4. Finally, petitioner Carmine Loiacono contends (Pet. 22-24) that he was improperly convicted of a substantive RICO offense because the predicate acts with which he was charged were conspiracy offenses. It is well settled, however, that conspiracy charges may properly

constitute predicate acts for a substantive RICO conviction. *United States* v. *Manzella,* 782 F.2d 533, 537-538 (5th Cir.), cert. denied, 476 U.S. 1123 (1986)); *United States* v. *Licavoli,* 725 F.2d 1040, 1044-1045 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Phillips,* 664 F.2d 971, 1015 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weisman,* 624 F.2d 1118, 1123-1124 (2d Cir.), cert. denied, 449 U.S. 871 (1980). Petitioner presents no conflict among the circuits on that issue, nor does he point to any language in the RICO statute that supports his contention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60443